Supreme Court, U.S.
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No. _____ OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1997

RICHARD A. SCHMIDT,
Petitioner,

v.

SHEET METAL WORKERS' NATIONAL PENSION FUND,
and
SHEET METAL WORKERS' NATIONAL PENSION FUND
BOARD OF TRUSTEES,
Respondents.

On Petition For Writ of Certiorari To The United States Court of Appeals for the Seventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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56 pp

QUESTION PRESENTED FOR REVIEW

Whether an ERISA fiduciary is excused from the duty to convey complete and correct material information to pension plan participants, when its non-fiduciary employee, rather than the fiduciary itself, conveys incorrect material information to pension plan participants, and the fiduciary did not personally contribute to that employee's conveyance of misinformation, the fiduciary exercised prudence in the selection and retention of that employee, and four years prior to the misrepresentation the fiduciary mailed written information containing the correct information to pension plan participants.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF CITATIONS iv

CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS IN THE CASE BY COURTS vi

BASIS FOR JURISDICTION vi

STATUTES AND REGULATIONS INVOLVED vii

STATEMENT OF THE CASE 1

ARGUMENT 7

I. THE SEVENTH CIRCUIT'S DECISION IN THIS CASE IS IN DIRECT CONFLICT WITH A DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT REGARDING AN ERISA FIDUCIARY'S LIABILITY WHERE ITS EMPLOYEE CONVEYS INCORRECT MATERIAL INFORMATION TO A PENSION PLAN PARTICIPANT 7

II. IT IS OF MAJOR IMPORTANCE THAT THE SEVENTH CIRCUIT'S ERRONEOUS DECISION IN THIS CASE BE OVERTURNED TO PROTECT MILLIONS OF PENSION PLAN PARTICIPANTS 11

CONCLUSION 14

APPENDIX 16

TABLE OF CITATIONS

Cases Cited

Anweiler v. American Electric Power Service Corp., 3 F.3d 986 (7th Cir. 1993) 10, 12

Barker v. American Mobile Power Corp., 64 F.3d 1397 (9th Cir. 1995) 12

Berlin v. Michigan Bell Telephone Co., 858 F.2d 1154 (6th Cir. 1988) 12

DeBruyne v. Equitable Life Assurer Soc. of U.S., 920 F.2d 457 (7th Cir. 1990) 13

Eddy v. Colonial Life Insurance Company of America, 919 F.2d 747 (D.C. Cir. 1990) 7-14

Local Union 2134, United Mine Workers of America v. Powhaten Fuel, Inc., 828 F.2d 710 (11th Cir. 1987) 12

Maez v. Mountain States Tel. and Tel., Inc., 54 F.3d 1488 (10th Cir. 1995) 12

Schmidt v. Sheet Metal Workers' National Pension Fund, et al., 128 F.3d 541 (7th Cir. 1997) vi

Taylor v. Peoples Natural Gas Co., 49 F.3d 982 (3rd Cir. 1995) 11

Statutes Cited

28 U.S.C. § 1254 vi

29 U.S.C. § 1104(a)(1) ..... vii, 11

29 U.S.C. § 1132(f) 6

Other Authority Cited

29 C.F.R. § 2509.75-8, FR-11 ..... viii, 12

CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS IN THE CASE BY COURTS

United States District Court for the Western District of Wisconsin, No. 96 C 141

United States Court of Appeals for the Seventh Circuit, Nos. 96-4144 & 96-3254

Schmidt v. Sheet Metal Workers' National Pension Fund, 128 F.3d 541 (7th Cir. 1997)

BASIS FOR JURISDICTION

Date judgment sought to be reviewed was entered:
October 17, 1997.

Date petition for rehearing was denied:
November 12, 1997.

Statutory Provision Believed to Confer Jurisdiction on this Court to review on a writ of certiorari the Seventh Circuit Court of Appeals Judgment: 28 U.S.C. § 1254

STATUTES AND REGULATIONS INVOLVED

Employee Retirement Income Security Act of 1974, § 404, 29 U.S.C. § 1104(a)(1):

> Subject to sections 1103(c) and (d), 1342 and 1344 of this title, a fiduciary shall discharge his duties with respect to the plan solely in the interest of the participants and beneficiaries and - -
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims;
>
> (C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and
>
> (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with

the provisions of this subchapter and subchapter III of this chapter.

29 C.F.R. § 2509.75-8, FR-11:

Q: In discharging fiduciary responsibilities, may a fiduciary with respect to a plan rely on information, data, statistics or analyses provided by other persons who perform purely ministerial functions for such plan, such as those persons described in D-2 above?

A: A plan fiduciary may rely on information, data, statistics or analyses furnished by persons performing ministerial functions for the plan, provided that he has exercised prudence in the selection and retention of such persons. The plan fiduciary will be deemed to have acted prudently in such selection and retention if, in the exercise of ordinary care in such situation, he has no reason to doubt the competence, integrity or responsibility of such persons.

STATEMENT OF THE CASE

Summary of Case

Petitioner Richard Schmidt (Richard), is a beneficiary and participant in Respondent Sheet Metal Workers National Pension Fund (the Fund). The Fund is an ERISA pension fund administered by Respondent Sheet Metal Workers National Pension Fund Board of Trustees (the Trustees, or collectively with the Fund, the NPF). Richard alleges that the Trustees violated their fiduciary duties towards he and his father, Allen Schmidt (Allen) -- also a Fund participant (collectively, the Schmidts) -- by failing to provide complete and correct material information regarding the Schmidts' options and status under the fund.

In March, 1994, the Schmidts informed the NPF that Allen was dying of cancer and that Allen wanted his son Richard to be the sole beneficiary of each and every pension benefit due on his death. The NPF, however, sent the Schmidts the wrong form to implement this intent. After Allen's death, within weeks of filling out and returning this incorrect form, the NPF thereupon denied Richard's sole beneficiary status because the Schmidt's had submitted the wrong form.

By order dated August 7, 1996, the district court, the Honorable John C. Shabaz, presiding, granted the NPF's motion for summary judgment. With regard to the issue pertinent to this petition for certiorari, the district court held that there had been no breach of fiduciary duty. Richard appealed to the United States Court of Appeals for the Seventh Circuit from that order and the ensuing judgment. By decision of October 17, 1997, and upon denial of rehearing on November 12, 1997, the Seventh Circuit affirmed the district court's judgment. The rule

of law set forth in the Seventh Circuit's decision is, however, in direct conflict with a decision of United States Court of Appeals for the District of Columbia Circuit.

Facts

The facts viewed in the light most favorable to Richard are as follows. The Fund is a multi-employer and employee benefit trust maintained under the Employee Retirement Income Security Act (ERISA). (60: 1).[1] The Trustees are the Fund's administrator and the fiduciaries of the pension plan. (15: 2, ¶ 4). The trustees have, at all times relevant to this action, had the authority to control and manage the operation and administration of the Fund. (Id.). At all times relevant to this action, the Trustees employed four persons to administer the Fund on a day to day basis, including Eunjae Lee, the NPF's so-called "Benefit Analyst." (17: 2, Ans. No. 3). As part of her job, Lee, who holds a masters degree in finance, was required to respond to letters and phone calls from participants and applicants concerning both specific and general information on pension benefits. (17: 10, Ans. No. 9.a.).

At all times relevant to this action, Richard's father, Allen, was a participant in the Fund. Prior to his death in 1994, Allen had worked as a sheet-metal worker for 37 years. (32: 2, ¶ 4). His formal education ended after high school. (Id.). Richard, Allen's only son, has also been a sheet-metal worker since his graduation from high school in 1970. (32: 1, ¶ 2). Richard was both a beneficiary of Allen's Fund benefits, and a Fund participant in his own right.

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[1] All citations are to the appellate record, except those cited to this petition's appendix.

On March 4, 1994, Allen was diagnosed with terminal pancreatic cancer. (32: 2, ¶ 6, Ex. H). At that time, his doctors told him that he had only a few months left to live. (Id.). Several days later, Allen told Richard that he wanted Richard to be the sole primary beneficiary of all Fund benefits available on his death. (Id., ¶ 9, Ex. H). On or about the same date, in accord with this intent, Allen telephoned the NPF's administrative offices, using the NPF's "800" number, to determine the procedures necessary to implement his intent. (32: 2-3, ¶ 10). Lee was the NPF employee who took this call. (32: 3, ¶ 12). During the call, Allen told Lee of his rapidly deteriorating medical condition and his desire to make his son the sole beneficiary of all pension benefits due on his death. (32: 2-3, ¶ 10).

During this conversation, Lee appeared to have difficulty understanding Allen. (32: 3, ¶ 11). Allen then asked his son to try and explain his intent to Lee. (Id.). Richard again explained to Lee his father's terminal situation and intent regarding distribution of his pension benefits upon his death. (Id., ¶ 12). Lee told Richard that she understood his father's situation and intent and would send out the proper paperwork to implement that intent. (Id., ¶ 13). At the time, the NPF had only two types of death benefits: a Pre-Retirement Spouse's Benefit (which required the deceased be married at the time of his death -- Allen was not) and a Lump Sum Death Benefit. (32: 6, ¶ 23, Ex. G).

Shortly after the March 10, 1994, conversation, the NPF sent Allen a form called a "Pension or Vesting application." (32: 3, ¶ 14). The NPF sent no other forms in response to Allen's request. (32: 5, ¶ 19). The "Pension or Vesting application" stated in relevant part that:

> The Primary Beneficiary is the person or persons who will receive *any pension benefits due in the event of your death.* The Successor Beneficiary is the person or persons who will receive any pension benefits due in the event of the death of both you and the primary beneficiary.

(32: 3-4, ¶ 14, Ex. A, p. 8) (emphasis added). In reliance on his belief that the NPF had correctly responded to his request, Allen completely filled out the "Pension or Vesting application" naming Richard as the "Primary Beneficiary," and his daughter, Ginger Riphahn, as the "Successor Beneficiary." (Id.).

On or about March 23, 1994, Thomas A. McFarland, M.D., sent the Fund a letter which stated that:

> This letter is to advise you that Mr. Allen Schmidt has terminal and locally advanced pancreatic cancer. He suffers from extremely debilitating pain ... . As such, this patient should be considered completely disabled ...

(32: 4, ¶ 15, Ex. B). This letter thus reiterated the fact that Allen was suffering from terminal cancer. On or about March 29, 1994, Richard mailed the NPF the completed "Pension or Vesting application." (Id., ¶ 16). Richard also sent a cover letter which stated, in part, that:

> Since my father is now 100% disabled, I have been appointed "power of attorney" to handle his affairs. If any further information is needed please notify myself immediately and I will assist in answering that information. Your immediate

attention to this matter is greatly appreciated ... .

(Id., ¶ 16, Ex. C). Again, the NPF was informed of Allen's rapidly deteriorating terminal condition. On April 4, 1994, the NPF received the properly filled out "Pension or Vesting application" form naming Richard as the primary beneficiary. (32: 4-5, ¶ 17, Ex. D).

Allen died on April 16, 1994, before the NPF had even completed processing his "Pension or Vesting application." (23, Ex. A). On his death, the only Fund benefits available to Allen Schmidt's beneficiaries were so-called NPF Lump Sum Death Benefits, which totaled $22,693.13 on that date. (15: 4, ¶ 13). In fact, the "Pension and Vesting application" form that the NPF sent Allen in response to the March 10, 1994, conversation, and which he quickly and fully completed and returned, had absolutely no effect on the distribution of any of his pension benefits after his death. (17: 9, Ans. No. 8).

On or about June 27, 1994, the NPF sent Richard a letter which stated that Allen had not filed a beneficiary card for the Fund's "death benefit," and, consequently, all of the benefits due on his death would be split between Allen's surviving children: Richard and his sister Ginger Riphahn. (32: 5, ¶ 21, Ex. F). On August 29, 1994, the NPF sent Richard a letter, signed by Lee, reiterating that the reason Richard was not the sole Primary Beneficiary under this distribution was that the Allen had not filed the required beneficiary card for the NPF Lump Fund Death Benefit. (32: 6, ¶ 23, Ex. G). At this time, the NPF also sent Richard a copy of the "National Pension Fund Pension Booklet, 1990 edition" which contained the required Death Benefit beneficiary designation card. (Id., ¶ 23).

On September 30, 1994, Richard sent the NPF a letter appealing its decision to split the Allen's lump sum death benefits between Richard and Ginger Riphahn in direct contradiction to Allen's clearly expressed intent to Lee. (32: 6, ¶ 25, Ex. H). By letter dated May 30, 1995, the Appeals Committee notified Richard that his appeal had been denied because the his father had not filed the required beneficiary card for the NPF Lump Fund Death Benefit. (32: 7, ¶ 27, Ex. J). This letter noted that the beneficiary card was contained "in each Pension Booklet. (Id.). Richard, however, had received a copy of the "Pension Booklet" on or about August 29, 1994, approximately four months after his father's death (32: 6, ¶ 23).

After the NPF rejected out-of-hand two demand letters sent from Richard's attorney (33: 1, ¶¶ 2, 3, Ex.'s A and B), Richard filed suit on February 20, 1996, in the U.S. District Court for the Western District of Wisconsin. Federal jurisdiction was based on 29 U.S.C. § 1132(f). On August 7, 1996, the district court granted the NPF's motion for summary judgment, and dismissing Richard's complaint with prejudice and costs (Appendix, pp. 28-29). Richard appealed from that order to the United States Court of Appeals for the Seventh Circuit. By decision of October 17, 1997, and denial of a motion for rehearing on November 12, 1997, the Seventh Circuit affirmed the district court's judgment. The Seventh Circuit's decision, however, constitutes a split-of-authority between that circuit and the D.C. Circuit, prompting Richard Schmidt's petition for certiorari to this Court.

ARGUMENT

I. THE SEVENTH CIRCUIT'S DECISION IN THIS CASE IS IN DIRECT CONFLICT WITH A DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT REGARDING AN ERISA FIDUCIARY'S LIABILITY WHERE ITS EMPLOYEE CONVEYS INCORRECT MATERIAL INFORMATION TO A PENSION PLAN PARTICIPANT

The Seventh Circuit's decision in this case is in direct conflict with *Eddy v. Colonial Life Insurance Company of America*, 919 F.2d 747 (D.C. Cir. 1990). In *Eddy*, an employee (Eddy), suffering from AIDS, and insured under his employer's health insurance policy, was informed that his employment based health insurance was being canceled. Hoping to maintain health insurance coverage, Eddy then telephoned the health insurer (Chubb), an ERISA fiduciary. During this call, Eddy told a Chubb agent that he wanted to continue his insurance coverage. While Eddy had a right to *convert* his insurance coverage to a personal policy, however, he had no right to *continue* his coverage. Either the Chubb insurance agent, or the agent's supervisor, told Eddy only that he could not continue his coverage. Relying on this representation, Eddy failed to convert his health insurance to an individual policy and thereby lost his health insurance coverage.

Based on Eddy's failure to use the term "convert" rather than "continue," the district court held that the fiduciary had not breached its duty. The D.C. Circuit, however, overturned the district court's decision, holding that an ERISA fiduciary "has a duty upon inquiry to convey to a lay beneficiary ... correct and complete material information about his status and options ...".

Id., p. 750. The D.C. Circuit further held:

> The duty to disclose material information is the core of a fiduciary's responsibility, animating the common law of trusts long before the enactment of ERISA. At the request of a beneficiary (and in some cases upon his own initiative), a fiduciary must convey complete and correct material information to a beneficiary.

Id. The D.C. Circuit continued:

> Eddy should not be penalized because he failed to comprehend the difference between "conversion" and "continuation." The same ignorance that precipitates the need for answers often limits the ability to ask precisely the right questions.
>
> The duty to communicate complete and correct material information about a beneficiary's status and options is not a novel one. Chubb [the fiduciary] expressly invited telephone inquiries from beneficiaries. ... Chubb maintained a separate unit charged in part with "taking phone calls" and "handl[ing] questions" about the conversion of insurance coverage. ... Finally, and perhaps most significantly, Chubb provided insured persons with a description of conversion options in a document that expressly directed beneficiaries: "*If you have any questions, please contact the Group Insurance Department.*"

Id. (emphasis in original).

Had the Seventh Circuit followed the foregoing rule of law as set forth in *Eddy*, Richard Schmidt would have prevailed in this case. The facts of this case and *Eddy* are virtually identical. Like the fiduciary in *Eddy*, in this case the NPF expressly invited telephone inquiries from its beneficiaries -- Richard and his father called them on their "800" number. Like the fiduciary in *Eddy*, in this case the NPF maintained a separate unit charged in part with "taking phone calls" and "handling questions" about pension benefits -- Eunjae Lee was the NPF's "Benefit Analyst" whose duties including "responding to participants' inquiries about pension benefits." (Appendix, p. 2). Like the "conversion options document" in *Eddy*, in this case the pension plan booklet that the NPF had allegedly mailed to Richard Schmidt four years prior to their employee's provision of misinformation, and which the NPF belatedly provided to Richard four months after his father died, specifically states: "*For any information concerning the Pension Plan write to SHEET METAL WORKERS NATIONAL PENSION FUND.*" (emphasis added). Finally, as in *Eddy*, the district court penalized Richard and Allen because they failed to comprehend that (1) only "Lump Sum Death Benefits" were available on Allen's death, and (2) a "Pension or Vesting application" was the improper form for designating the primary beneficiary for the death benefits. Indeed, the facts of this case are more egregious then those in *Eddy*. In *Eddy*, the fiduciary's employee merely failed to convey complete information. In this case, the fiduciary's employee affirmatively conveyed misinformation. Unlike *Eddy*, however, the Court of Appeals in this case affirmed the district court's erroneous decision.

Completely ignoring *Eddy* (it is cited nowhere in the Seventh Circuit's decision), on virtually the same facts, the Seventh Circuit came to exactly the opposite conclusion as the D.C. Circuit. This, despite the fact that *Eddy* had previously

been cited with approval by the Seventh Circuit. *See, Anweiler v. American Electric Power Service Corp.*, 3 F.3d 986, 991 (7th Cir. 1993). In this case, jettisoning prevailing statutory and case law, the Seventh Circuit has narrowed the holding of *Eddy* beyond recognition. As opposed to the law in the D.C. Circuit, the law in the Seventh Circuit now states that an ERISA fiduciary has a duty upon inquiry to convey to a lay beneficiary correct and complete material information about his status and options, *except where*:

1. The fiduciary initially mails written materials containing the correct information to plan participants (Appendix, p. 11);[2]

2. A non-fiduciary agent of the fiduciary subsequently conveys the incomplete or incorrect material information (Id.);[3] and

3. The fiduciary did not participate in the misleading information or fail in the exercise of care in hiring, retaining or training the non-fiduciary agent. (Id., p. 12).

All three of the Seventh Circuit's foregoing bases for its ominous narrowing of the ERISA fiduciary duty were, however, also present in *Eddy*.

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[2] In this case, the written materials were *mailed* four years prior to benefit analyst's oral misrepresentation. There is no evidence that either Allen or Richard were in possession of such written material at or subsequent to the benefit analyst's oral misrepresentation, or that they had even received the written material four years previously.

[3] In this case, information that Allen and Richard indisputably relied upon to their detriment.

Prior to Eddy's call for information, Chubb had provided Eddy with "a description of conversion options in a document." Thus, as in this case, in *Eddy* the fiduciary had initially mailed written material containing the correct information to the plan participants. Moreover, as in this case, in *Eddy* a non-fiduciary insurance agent, not a fiduciary, failed to covey complete and correct information to Eddy. Finally, as in this case, in *Eddy* no evidence whatsoever indicated that a fiduciary had participated in any way in the agent's provision of misleading information, or that that agent had been negligently hired, retained or trained. Thus, in every substantive aspect, the Seventh Circuit's decision in this case is in direct conflict with the D.C. Circuit's decision in *Eddy*.

II. IT IS OF MAJOR IMPORTANCE THAT THE SEVENTH CIRCUIT'S ERRONEOUS DECISION IN THIS CASE BE OVERTURNED TO PROTECT MILLIONS OF PENSION PLAN PARTICIPANTS

The Seventh Circuit's new law is adrift, without anchor or direction in either the statutory or regulatory terms of ERISA. Its decision scuttles traditional benefit trust case law and sound public policy. The law is clear that fiduciaries in trust cases are held to the highest standards of care with regard to their beneficiaries, and that ERISA requires that fiduciaries discharge their duties solely in the interest of the participants and beneficiaries. 29 U.S.C. § 1104(a)(1). Moreover, no prior published decision has indicated that the duty to convey complete and correct material information to participants and beneficiaries applies to anything less than *each* conveyance of such material information, whether written or oral, and whether or not earlier communications may have previously provided complete and correct information that is subsequently misrepresented. *See, e.g., Eddy, supra*; *Taylor v. Peoples*

Natural Gas Co.., 49 F.3d 982, 986 (3rd Cir. 1995); *Barker v. American Mobile Power Corp.*, 64 F.3d 1397, 1403 (9th Cir. 1995); *Berlin v. Michigan Bell Telephone Co.*, 858 F.2d 1154, 1163 (6th Cir. 1988); *Maez v. Mountain States Tel. and Tel., Inc.*, 54 F.3d 1488, 1499 (10th Cir. 1995); *Local Union 2134, United Mine Workers of America v. Powhaten Fuel, Inc.*, 828 F.2d 710, 713 (11th Cir. 1987); *Anweiler v. American Electric Power Service Corp.*, 3 F.3d 986, 991 (7th Cir. 1993).

While failing to even acknowledge *Eddy* in its devastating attack on the fiduciary duty, the Seventh Circuit sought support in 29 C.F.R. § 2509.75-8, FR-11, which provides that an ERISA fiduciary may rely on information "furnished by persons performing ministerial functions for the plan." (Appendix, p. 12). This regulation, however, is inapposite. That fiduciaries may rely on information furnished *to them* by ministerial employees is a world apart from saying that fiduciaries may rely on information furnished *to plan beneficiaries and participants* by ministerial employees. In the first instance, the fiduciary bears the cost of any mistaken information provided to it by the fiduciary's own ministerial employee. In the latter instance, the participant or beneficiary bears the cost of any mistaken information provided to them by the fiduciary's ministerial employee.

In support of its harsh decision, the Seventh Circuit also noted that while:

> ERISA fiduciaries do not necessarily satisfy their fiduciary obligations merely by complying with the disclosure requirements imposed by the statute ..., the adequacy of the relevant disclosures in the written plan materials is important in cases like this where a non-fiduciary

> agent subsequently provides erroneous information in response to a question from a single participant.

(Appendix, p. 11). The implication of this statement is that if Lee had made a single misrepresentation to numerous individuals, not just to Richard and his father, the Seventh Circuit might have reached a different result. It is hard to understand, however, how the same misrepresentation, under the same circumstances (but for the number of persons receiving the misrepresentation), can become a breach of the duty by the fiduciary depending only on the number of persons to whom the misrepresentation is made. The huge body of ERISA law provides no basis for this decision. Nor does the Seventh Circuit's decision cite any authority indicating that there is a "sliding scale" for a finding of breach of fiduciary duty to convey complete and correct material information, depending upon how many persons are ill-effected. Moreover, this rationalization for the Seventh Circuit's ill-advised decision is also in direct conflict with *Eddy* which was also a case "where a non-fiduciary agent subsequently provides erroneous information in response to a question from a single participant."

The magnitude of damage to the fiduciary duty created by the Seventh Circuit's decision in this case can be shown by analogy. An ERISA fiduciary, for example, also has a duty to prudently manage pension funds. *See, e.g., DeBruyne v. Equitable Life Assurer Soc. of U.S.*, 920 F.2d 457 (7th Cir. 1990). Pursuant to the Seventh Circuit's decision in this case, the fiduciary may hire an employee to track the investments in which the pension funds have initially and properly been placed by the fiduciary himself, in accordance with his fiduciary duty. The fiduciary may then give explicit instructions to the employee regarding the market circumstance under which the

employee should call the broker to have the funds transferred from a stock account to a bank account, and vice versa. The employee's call conveying instructions to the broker constitutes no more than a ministerial duty, and the conditions in which the employee is supposed to make the call have been strictly delineated by the fiduciary, i.e., the employee has no discretion. Thus, if market conditions changed, but the employee negligently failed to properly transfer the funds, causing an otherwise preventable loss to the pension fund portfolio, using the present case as a precedent, the fiduciary would be absolved of liability for breach of duty to properly manage pension funds, so long has he had hired, retained and trained the employee with due care, and had not himself participated in the improper transfer of funds. Surely this cannot be the result intended by ERISA.

CONCLUSION

Essentially, the Seventh Circuit decided, in direct conflict with *Eddy*, that as between, on the one hand, a dying man and his son, both life-long sheet metal workers with high school educations, and, on the other hand, a multi-million dollar pension fund which has employed a "benefit analyst" with a master's degree in finance, it is the dying man and his son who should bear the cost of the benefit analyst's misrepresentation to them. In a larger sense, the Seventh Circuit's decision not only tells participants (often blue-collar workers with high school educations or less) that they have a duty to enshrine their pension fund booklets forever, but also that if they do not understand the complicated rules in those booklets they had better not call the pension fund itself for an explanation, even though their own pension fund has hired an employee for the express purpose of responding to participant's inquiries, and has so informed the participants. While directly harming only

Richard, the Seventh Circuit's decision in this case has the clear potential to absolve a large spectrum of derelictions of duty by ERISA fiduciaries, potentially harming millions of pension plan participants.

In sum, in its decision in this case the Seventh Circuit seems intent on cutting back on long held duties of plan fiduciaries, who are required to discharge their duties solely in the interest of the participants and beneficiaries, and who are best situated to respond to the mistakes by their own employees. Richard respectfully submits that this intent has no support in the law, is in direct conflict to the holding in *Eddy*, is poor public policy and works an unjust outcome.

For all of the foregoing reasons, Petitioner Richard Schmidt respectfully requests that this Court grant his Petition for Certiorari.

Respectfully submitted,

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APPENDIX

Document	Appendix Page
Decision of United States Court of Appeals for the Seventh Circuit in *Schmidt v. Sheet Metal Workers' National Pension Fund, et al,* Nos. 96-3144 & 96-3254, affirming District Court's summary judgment.	1
Decision of United States District Court, Western District of Wisconsin, in *Schmidt v. Sheet Metal Workers' National Pension Fund, et al.,* No. 96-C-0141-S, granting summary judgment.	14
Order of United States Court of Appeals for the Seventh Circuit in *Schmidt v. Sheet Metal Workers' National Pension Fund, et al,* Nos. 96-3144 & 96 3254, denying petition for rehearing.	30

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 96-3144 & 96-3254

RICHARD A. SCHMIDT,

Plaintiff-Appellant/Cross-Appellee,

v.

SHEET METAL WORKERS' NATIONAL PENSION FUND and SHEET METAL WORKERS' NATIONAL PENSION FUND BOARD OF TRUSTEES,

Defendants-Appellees/Cross-Appellants.

Appeals from the United States District Court
for the Western District of Wisconsin.
No. 96 C 141—**John C. Shabaz,** *Chief Judge.*

ARGUED FEBRUARY 27, 1997—DECIDED OCTOBER 17, 1997

Before BAUER, HARLINGTON WOOD, JR., and ROVNER, *Circuit Judges.*

ROVNER, *Circuit Judge.* Richard A. Schmidt ("Richard") initiated this ERISA action against the Sheet Metal Workers' National Pension Fund ("NPF" or "Fund") and its Board of Trustees ("Trustees") to recover the portion of his father's death benefit that the Fund disbursed to Richard's sister. Although Richard's father failed to designate a beneficiary for his death benefit, Richard contends that his father intended that he be the sole

beneficiary and that the proper designation was never made only because a benefit analyst employed by the Fund sent the wrong form after speaking with Richard and his father over the telephone. Richard therefore argues that he is entitled to the contested benefits either under an estoppel or breach of fiduciary duty theory. He further contends that defendants violated ERISA by failing to adequately notify him of his appeal rights. After discovery, the district court granted summary judgment to defendants on each of Richard's claims. Richard now challenges that disposition here, and defendants cross-appeal from the denial of their request for an award of attorney's fees. We agree that defendants were entitled to summary judgment on each of Richard's claims under ERISA. We also do not believe that the district court abused its discretion in refusing to award attorney's fees. We therefore affirm the judgment below.

I.

On March 4, 1994, Allen J. Schmidt ("Allen") was told by his doctors that he had pancreatic cancer and that he had but a few months to live. Allen was not married at the time, and he therefore wished to designate his son Richard as the sole beneficiary of the pension benefit that would be payable upon his death by the NPF, a multi-employer benefit trust fund maintained under ERISA. On March 10, Allen called the Fund's administrative office to inquire about the procedure for designating his son as the sole beneficiary of his death benefit. He spoke on that occasion to Eunjae Lee, an NPF benefit analyst.[1] Allen explained to Lee that he was terminally

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[1] Lee's responsibilities as a benefit analyst included applying pension rules, requesting additional information from applicants, determining benefit amounts due under the plan, and responding to participants' inquiries about pension benefits.

ill and that he wished to designate his son as the sole beneficiary of his pension death benefit. Because Allen believed that Lee was not fully understanding his request, he asked Richard to attempt to explain it to her. Richard reiterated to Lee that Allen was terminally ill and that he wished to designate Richard as the sole beneficiary of his death benefit. Lee indicated to Richard that she understood and that she would send the proper paperwork. Several days later, the Schmidts received a "Pension or Vesting Application," which they promptly completed and returned to the Fund. On that application, Allen designated Richard as his primary beneficiary and his daughter, Ginger Riphahn, as the successor beneficiary. It turned out, however, that Lee had sent the Schmidts the incorrect form. The "Pension or Vesting Application" was exactly that—an application for pension benefits, and was not the proper mechanism for designating a beneficiary for a pension plan death benefit. A death benefit beneficiary was properly designated only once a plan participant submitted to the Fund the "benefit designation card" included in the front of the Fund's pension plan booklet (the "Booklet").[2] This Booklet had been mailed to all plan participants in 1990.

Allen died on April 16, 1994, and on August 29, 1994, Richard received a letter from Lee explaining that be-

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[2] The summary included in the Booklet explains:

> Use the card attached in this booklet to name your beneficiary for this [death] benefit. File it with your local union after completion. The Plan does not accept any beneficiary card other than its own.
>
> If no Plan beneficiary card is filed with your local union, the Death Benefit will be paid to your legal spouse. If you have no spouse, it will be paid to your children.

(R. 24, Ex. B, Plan Booklet at 13.)

cause his father had failed to name a beneficiary for his death benefit, the $22,693.13 benefit would be divided evenly between Allen's surviving children in accordance with section 7.01 of the pension plan.[3] Lee included with this letter another copy of the Booklet, which sets out the death benefit eligibility rules and an individual's appeal rights. Upon receiving Lee's letter, Richard called the Fund's administrative office and this time spoke with Barry Sweger, an assistant benefits coordinator. Richard explained to Sweger that Lee had sent his father the wrong form after their March 10 telephone conversation, and Sweger indicated that Richard should write down exactly what had happened and note that his letter was to be considered an appeal to the Fund's Board of Trustees. Sweger explained that all information substantiating Richard's position should be included in the letter and that any supporting documentation should be appended. Sweger told Richard to mail the letter to him and that the Trustees then would consider Richard's appeal at their next meeting. Richard did as he was told, mailing his letter to Sweger on September 30, 1994. He received a letter in response which indicated that his

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[3] That section provides that:

> If the Participant's primary and successor beneficiary or beneficiaries designated pursuant to Section 7.05 die prior to the death of the Participant, or if no beneficiary is designated in accordance with such Section, then any death benefit otherwise payable under this Section shall be paid in the following order: (i) to the Participant's spouse; (ii) if no spouse survives the Participant, to his children . . . .

(R. 24, Ex. B, Plan at § 7.01.) Section 7.05, in turn, which governs the designation of beneficiaries, provides that "[a]ll designations of beneficiaries shall be made in the form and manner required by the Trustees who shall be the sole judges of the validity thereof." (*Id.* at § 7.05.)

appeal had been received and that it would be considered at the next meeting of the Fund's Trustees. By letter dated May 30, 1995, Richard was notified that the Appeals Committee of the Board of Trustees, consisting of two of the six trustees, had considered his appeal at their May 2 meeting and had determined to deny it. The letter provided the following explanation of the Appeals Committee's decision:

> As Mr. Schmidt died before he had become a Pensioner, and as he left no surviving spouse, a Death Benefit was payable under [section 7.01]. The designation of beneficiaries for such a benefit is to be made on the form established by the Fund Trustees, in accordance with Section 7.05. This form is a card, found in each Pension Booklet, designating beneficiaries to receive the Sheet Metal Workers National Pension Fund Death Benefit.
>
> Mr. Schmidt did not have such a designation on file at the time of his death. The designation of beneficiary section completed by Mr. Schmidt on the pension application received shortly before his death is not the form required by the Trustees to designate beneficiaries for a Death Benefit, but is a designation of beneficiary for *pension* benefits, in the event any such payments are payable after the death of the retiree.
>
> As is provided for in Section 7.01, as no Death Benefit beneficiary designation had been filed by Mr. Schmidt in accordance with Section 7.05, the Death Benefit is payable to Mr. Schmidt's surviving children. As Mr. Schmidt left two surviving children, you and Ginger Riphahn, each of you receives one-half of the Death Benefit.

(R. 32, Ex. J (emphasis in original).)

II.

We review the district court's grant of summary judgment on Richard's ERISA claims de novo. *Klosterman v. Western Gen. Management, Inc.*, 32 F.3d 1119, 1122 (7th Cir. 1994). We must affirm the judgment for defendants if the record reveals that there is no genuine issue of material fact and that they are entitled to judgment as a matter of law. *Anweiler v. American Elec. Power Serv. Corp.*, 3 F.3d 986, 990 (7th Cir. 1993).

A.

Richard does not dispute that the Trustees' decision to distribute his father's death benefit to him and his sister in equal shares is consistent with the explicit terms of the Plan and the Booklet describing it. The Plan provides that a participant's designation of a beneficiary for his death benefit must be made "in the form and manner required by the Trustees" (Plan § 7.05), and the Booklet explains that the only proper way to designate a death benefit beneficiary is by filing the attached beneficiary card with the participant's local union. (Plan Booklet at 13.) Both the Plan and Booklet note that if no card is on file, the death benefit will be paid first to the participant's surviving spouse, and if no spouse survives, to the participant's children. (Plan § 7.01; Plan Booklet at 13.) The Trustees determined that because Allen had no card on file at the time of his death, the benefit would be distributed to his two children in equal shares, as required by the Plan. Nor does Richard argue that defendants failed to notify his father of the requirement that he designate a beneficiary on the card provided in the Booklet. It is undisputed that the Booklet and Plan were mailed to all participants, including Allen Schmidt, in 1990. As a result, Richard does not assert that the Trustees' decision with respect to his father's death benefit

was arbitrary and capricious.[4] He argues instead that defendants should be estopped from adhering to the literal terms of the Plan because of the misrepresentation of its benefit analyst.

We agree with the district court, however, that defendants are not estopped from applying the literal terms of the Plan by any oral representation made by Lee in the course of the March 10, 1994 telephone conversation. As we have noted on many occasions, oral representations that conflict with the terms of a written plan will not be given effect, as the written instrument must control. *Plumb v. Fluid Pump Serv., Inc.*, No. 96-2688, slip op. at 11-12, 1997 WL 526202 (7th Cir. Aug. 27, 1997) ("if the written terms of an ERISA plan do not entitle the claimant to the coverage sought, benefits will not be forthcoming on the basis of oral representations to the contrary."); *Vershaw v. Northwestern Nat'l Life Ins. Co.*, 979 F.2d 557, 559 (7th Cir. 1992); *Pohl v. National Benefits Consultants, Inc.*, 956 F.2d 126, 128 (7th Cir. 1992); *Bartholet v. Reishauer A.G. (Zurich)*, 953 F.2d 1073, 1078 (7th Cir. 1992). Although a subsequent modification to a written plan may equitably estop the plan administrator from denying benefits if the alleged modification is in writing (*see Black v. TIC Investment Corp.*, 900 F.2d 112, 116 (7th Cir. 1990)), we do not think the writing requirement was satisfied here by the fact that Lee subsequently mailed to the Schmidts the "Pension or Vesting Application." That application did not itself indicate that it was the appropriate mechanism for designating a death benefit beneficiary. Richard's estoppel claim instead depends on what transpired during

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[4] Because the Plan provides the Trustees with discretion in interpreting its terms (*See* Plan § 8.03), we would be required to defer to the Trustees' judgment unless we were to find it arbitrary and capricious. *Chojnacki v. Georgia-Pacific Corp.*, 108 F.3d 810, 814 (7th Cir. 1997).

the March 10 telephone conversation—specifically on what he and his father may have told Lee about Allen's intent, and on Lee's alleged statement that she would send Allen the proper paperwork for designating a death benefit beneficiary. The oral representation upon which Richard's claim is based clearly conflicts with the designation method prescribed by the Plan Booklet, and the Plan itself requires all beneficiary designations to be in the proper form. That is presumably to avoid beneficiary disputes like this one, which only will arise upon a participant's death, when it is too late for his intent to be clarified. It is in precisely this situation, then, that we must refuse to apply estoppel principles to give effect to oral representations that contradict written Plan terms. For these reasons, we agree with the district court that Richard's estoppel claim must fail.

B.

Richard also contends that the Trustees breached their fiduciary duties when Lee advised the Schmidts, erroneously it turned out, that the beneficiary designation could be made on the "Pension or Vesting Application." Lee's misstatement, according to Richard, breached the Trustees' duty to provide plan participants with complete and accurate material information regarding their status and options under an ERISA plan.

In *Anweiler v. American Elec. Power Serv. Corp.*, 3 F.3d 986, 991 (7th Cir. 1993), we explained that "[f]iduciaries breach their duties of loyalty and care [when] they mislead plan participants or misrepresent the terms or administration of a plan." A plan fiduciary may violate its duties, we said, either by affirmatively misleading plan participants about the operations of a plan, or by remaining silent in circumstances where silence could be considered misleading. *Id.; see also Chojnacki v. Georgia-Pacific Corp.*, 108 F.3d 810, 817 (7th Cir. 1997). In this

case, Richard contends that he and his father were affirmatively misled by Lee's directions for designating a death benefit beneficiary. The district court did not doubt that the Schmidts had been misled, but in granting summary judgment, the court focused on whether Lee's misstatement could be said to have breached the duties owed to plan participants by the Trustees themselves, as they were the only ERISA fiduciaries named as defendants in this case. We therefore turn to that question now.

It goes without saying that a claim for breach of fiduciary duty lies only against an individual or entity that qualifies as an ERISA "fiduciary." *Plumb*, No. 96-2688, slip op. at 7; *Klosterman*, 32 F.3d at 1122. And to be a fiduciary, the individual or entity involved must exercise a degree of discretion over the management of the plan or its assets, or over the administration of the plan itself. *See* 29 U.S.C. § 1002(21)(A) (defining "fiduciary"); *see also Pohl*, 956 F.2d at 129 ("ERISA makes the existence of discretion a sine qua non of fiduciary duty."). It is clear that Lee herself was not an ERISA fiduciary, as she merely performed ministerial and clerical functions relating to the administration of the Plan; she had no discretionary authority or control in the tasks she was assigned. *See* 29 C.F.R. § 2509.75-8, D-2 ("a person who performs purely ministerial functions . . . for an employee benefit plan within a framework of policies, interpretations, rules, practices and procedures made by other persons is not a fiduciary . . ."); *see also Klosterman*, 32 F.3d at 1124-25 (claim administrator not a fiduciary). Indeed, Richard has not even made Lee's status an issue, as she is not named as a defendant. The Trustees alone are alleged to have breached their fiduciary duties, and given their discretionary authority over the management and administration of the Fund, we agree that they would qualify as ERISA fiduciaries. *See* 29 C.F.R.

§ 2509.75-8, D-3 (plan administrator or trustee necessarily a fiduciary under the Act).

Yet the Trustees did not make the misstatement on which Richard's fiduciary duty claim is based—Lee did. Significantly, no evidence suggests that the Trustees either authorized, participated in, or had knowledge of Lee's misstatement, or that the Trustees deliberately withheld information from Lee about the proper means of making a beneficiary designation. *Cf. Varity Corp v. Howe,* 116 S. Ct. 1065, 1073-74 (1996) (plan administrator breached fiduciary duty when it communicated benefit options in a misleading fashion through individuals authorized to communicate as fiduciaries); *In re Unisys Corp.,* 57 F.3d 1255, 1264-65 (3d Cir. 1995) (breach of fiduciary duty claim established where company management consistently misrepresented plan terms, both orally and in writing, to all employees), *cert. denied,* 116 S. Ct. 1316 (1996); *Fischer v. Philadelphia Elec. Co.,* 994 F.2d 130, 134-35 (3d Cir.) (plan administrator may have breached fiduciary duty by failing to disclose to benefits counselors, who fielded calls from participants, that it was considering an early retirement plan), *cert. denied,* 510 U.S. 1020 (1993); *Berlin v. Michigan Bell Tel. Co.,* 858 F.2d 1154, 1163-64 (6th Cir. 1988) (breach of fiduciary duty claim will lie where plan administrator and individual fiduciary made misrepresentations to participants). Rather, this is a case in which the Trustees provided complete and correct information to participants both in the Plan itself and in the Plan Booklet only to have a ministerial employee make a negligent misrepresentation in response to a single question from a single participant. The district court concluded that absent evidence that the Trustees had participated in Lee's misstatement or had failed to exercise care in hiring her, the Trustees could not be said to have breached their fiduciary duties solely by virtue of Lee's misstatement. We believe that in general,

the district court was correct, but we would add that the Trustees may also breach their fiduciary duties by failing to exercise care in training someone like Lee, or by retaining her in circumstances where they should know her performance to be inadequate. There is no evidence that the Trustees in this case were involved in any way with Lee's misstatement. Nor has Richard attempted to show that the Trustees failed to exercise due care either in hiring or retaining Lee, or in training her to respond to inquiries from plan participants. We therefore agree with the district court that Lee's misstatement would not in these circumstances support a breach of fiduciary duty claim against the Trustees.

We hasten to add, however, that our resolution of this case depends in large measure on the fact that the Trustees provided complete and accurate information in the Plan and Plan Booklet they distributed to all participants. Although ERISA fiduciaries do not necessarily satisfy their fiduciary obligations merely by complying with the disclosure requirements imposed by the statute (*see Varity*, 116 S. Ct. at 1073-74; *In re Unisys Corp.*, 57 F.3d at 1264), we believe that the adequacy of the relevant disclosures in the written plan materials is an important consideration in a circumstance like this where a non-fiduciary agent subsequently provides erroneous information in response to a question from a single participant. *Cf. Estate of Becker v. Eastman Kodak Co.*, 120 F.3d 5, 9-10 (2d Cir. 1997) (defendant breached fiduciary duty to provide complete and correct information when its written materials were ambiguous on the relevant issue and a benefits counselor provided materially misleading information); *Taylor v. Peoples Natural Gas Co.*, 49 F.3d 982, 987-89 (3d Cir. 1995) (plan administrator breached fiduciary duty when its agent orally advised participants about possible changes in the plan when the fiduciaries had not communicated with participants in writing on the matter). If the written materials

were inadequate, then the fiduciaries themselves must be held responsible for the failure to provide complete and correct material information in the event that a non-fiduciary agent provides misleading information. We are unwilling to conclude, however, that the fiduciaries also will be held responsible when their written disclosures were adequate, they had no involvement in communicating the misleading information, and there has been no showing that the fiduciaries failed to exercise due care in hiring, retaining, or training the non-fiduciary agent for the tasks assigned her. *Cf.* 29 C.F.R. § 2509.75-8, FR-11 ("A plan fiduciary may rely on information, data, statistics or analyses furnished by persons performing ministerial functions for the plan, provided that he has exercised prudence in the selection and retention of such persons."). Because that latter statement describes this case, we must affirm the summary judgment for the Trustees on Richard's beach of fiduciary duty claim.

C.

Two issues remain, which we need touch on only briefly here. First, Richard contends that defendants violated 29 U.S.C. § 1133(2) by denying him a full and fair review of his claim to Allen's death benefit. We agree with the district court, however, that the notice provided to Richard of his appeal rights was adequate. There is no dispute, moreover, that Richard submitted to the Appeals Committee all of the materials in his possession that supported his claim to the death benefit. Richard thus has not established a violation of section 1133(2).

Defendants, finally, have filed a cross-appeal from the district court's denial of their motion for an award of attorney's fees under 29 U.S.C. § 1132(g)(1). The lower court concluded that defendants were not entitled to an award of fees because Richard's position in this litigation was substantially justified even if ultimately unsuccess-

ful. *See Little v. Cox's Supermarkets*, 71 F.3d 637, 644 (7th Cir. 1995) (ultimate test is whether the losing party's position was substantially justified). We review that conclusion on appeal only for an abuse of discretion (*id.*), and having conducted that review, we find no abuse of the district court's discretion here. We therefore affirm the district court's decision denying defendants an award of attorney's fees.

III.

For the foregoing reasons, we agree with the district court that the NPF and its Board of Trustees were entitled to summary judgment on each of Richard Schmidt's claims. At the same time, however, we agree that Richard's litigation position was substantially justified and that defendants were therefore not entitled to an award of attorney's fees. No costs shall be awarded in this court.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA-97-C-006—Midwest Law Printing Co., Inc., Chicago—10-17-97

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

RICHARD A. SCHMIDT,

Plaintiff,

v.

MEMORANDUM
AND ORDER

96-C-141-S

SHEET METAL WORKERS' NATIONAL
PENSION FUND, and SHEET METAL
WORKERS' NATIONAL PENSION FUND
BOARD OF TRUSTEES,

Defendants.

Plaintiff Richard A. Schmidt commenced this ERISA action to recover death benefits allegedly owed him as the beneficiary of a participant in the defendant Sheet Metal's Workers' National Pension Fund. Jurisdiction is based on 29 U.S.C. § 1331. The matter is presently before the Court on defendants' motion for summary judgment.

FACTS

The following is a summary of the facts viewed in the light most favorable to the plaintiff. Defendant Sheet Metal Workers' National Pension Fund (The Fund) is a multi-employer and employee benefit trust fund maintained under the Employee Retirement Income Security Act (ERISA). The Fund

is self-insured and governed by defendant Sheet Metal Workers' National Pension Fund Board of Trustees (Trustees) which consists of three trustees representing employees who are members of local unions and three trustees representing employers in the sheet metal workers' industry. Defendant Fund provides a pension plan to employers and employees in the sheet metal industry.

A pension plan booklet, including a summary plan description and the complete text of the pension plan was mailed to all participants in 1990. Section 7.01 of the pension plan providing for the payment of death benefits prior to retirement provides in part as follows:

> If the Participants primary and successor beneficiary or beneficiaries designated pursuant to Section 7.05 die prior to the death of the Participant, or if no beneficiary is designated in accordance with such Section, then any death benefit otherwise payable under this Section shall be paid in the following order: (i) to the Participant's spouse; (ii) if no spouse survives the Participant, to his children ...

Section 7.05 of the pension plan which governs the designation of beneficiaries provides "all designations of beneficiaries shall be made in the form and manner required by the trustees who shall be the sole judges of the validity thereof."

The pension fund booklet has a card attached to the first page for use in the designation of a beneficiary. Page thirteen of the summary contained in the pension booklet provides in part:

> Use the card attached in this booklet to name your beneficiary for this benefit. File it with your local union after completion. The Plan does not accept any beneficiary card other than its own.
>
> If no Plan beneficiary card is filed with your local union, the Death Benefit will paid to your legal spouse. If you have no spouse, it will be paid to your children.

Section 8.03 of the plan provides that:

> the Trustees shall have the sole and absolute power, authority and discretion to determine:
>
> (a) the standard of proof required in any case;
>
> (b) the application and interpretation of this Plan;
>
> (c) entitlement to or amount of a pension;

As Plan administrator defendant Trustees employed four people to administer the Plan on a day to day basis. One such employee, Eunjae Lee, was employed in the capacity of a benefits analyst. Her job was to apply pension rules, determine benefit amounts and respond to questions from participants.

Plaintiff's father, Allen Schmidt, was a participant in defendant Fund's Plan. On March 4, 1994 Allen Schmidt was diagnosed with terminal cancer. He decided to make plaintiff

the sole beneficiary of his pension plan death benefit. On March 10, 1994 Allen Schmidt telephoned defendants and spoke to Lee, advising her of his medical condition and his intent to make plaintiff the sole beneficiary of his pension death benefit. In response to the conversation Lee sent Allen Schmidt and the plaintiff a form called a "Pension or Vesting Application" which Allen Schmidt promptly completed and returned to defendants. In fact, that form was not the appropriate mechanism for the designation of a pension plan death benefit beneficiary but was the appropriate form for an application for pension benefits.

Allen Schmidt died on April 16, 1994. On June 27, 1994 defendants sent a letter to plaintiff advising that there was no beneficiary card on file and consequently that his father's pension death benefit in the amount of $22,693.13 would be distributed equally to plaintiff and his sister pursuant to the terms of the plan.

On August 29, 1994 plaintiff called the Fund and spoke to Barry Sweger, the Assistant Benefits Coordinator for the Fund. Plaintiff advised Sweger about the mistake concerning the form. Sweger told plaintiff to write down the exact story of what happened and mail it to him. Sweger advised plaintiff that this letter would be a letter of appeal to the defendant Trustees and that the appeal would be scheduled at the next meeting of the Trustees.

On September 30, 1994 plaintiff wrote a letter to the defendants explaining the fact that the wrong form had been mailed to him due to the negligence of Lee. The letter closes as follows: "Please forward this matter to the Board of Trustees, because this is a letter of appeal!!! in regards to Apl. No. 53223."

On May 30, 1995 the defendants appeals committee notified plaintiff that the appeal had been denied. After a careful review of the facts and the Fund rules and regulations, the Committee determined that Mr. Schmidt's death on April 16, 1994 was a Death Before Retirement as provided for under Section 7.01(a) of the Fund rules (1990 edition).

As Mr. Schmidt died before he had become a pensioner, and as he left no surviving spouse, Death Benefit was payable under this Section. The designation of beneficiaries for such a benefit is to be made on the form established by the Fund Trustees, in accordance with Section 7.05. This form is a card, found in each Pension booklet, designating beneficiaries to receive the Sheet Metal Workers National Pension Fund Death Benefit.

Mr. Schmidt did not have such a designation on file at the time of his death. The designation of beneficiary section completed by Mr. Schmidt on the pension application received shortly before his death is not the form required by the Trustees to designate beneficiary for a Death Benefit, but is a designation of beneficiary for pension benefits, in the event any such payments are payable after the death of the retiree.

As is provided in Section 7.01, as no Death Benefit beneficiary designation has been filed by Mr. Schmidt in accordance with Section 7.05 the Death Benefit is payable to Mr. Schmidt's surviving children. As Mr. Schmidt left two surviving children, you and Ginger Riphahn, each of you receives one-half of the death benefit.

The death benefit was distributed in accordance with the ruling.

MEMORANDUM

Defendants seek summary judgment asserting that the plan provisions were correctly applied to deny additional benefits to the plaintiff and that as a matter of law an oral misrepresentation cannot result in estoppel which would create liability for benefits not otherwise available. Finally, defendants assert that Lee was not a fiduciary and her acts could not give rise to a claim for breach of fiduciary duty against the defendants. Plaintiff opposes summary judgment on the basis that he is entitled to recover benefits under both estoppel and breach of fiduciary duty theories and that issues of fact preclude resolution of this matter on summary judgment.

Summary judgment is appropriate when, after both parties have the opportunity to submit evidence in support of their respective positions and the Court has reviewed such evidence in the light most favorable to the nonmovant, there remains no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), Federal Rules of Civil Procedure.

A fact is material only if it might affect the outcome of the suit under the governing law. Disputes over unnecessary or irrelevant facts will not preclude summary judgment. A factual issue is genuine only if the evidence is such that a reasonable factfinder could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Under Rule 56(e) it is the obligation of the nonmoving party to set forth specific facts showing that there is a genuine issue for trial.

Entitlement to Benefits.

Pursuant to Section 8.03 of the pension plan defendant Trustees have sole and absolute power, authority and discretion to determine the application and interpretation of the plan. As such, their determination concerning the allocation of death benefits can only be overturned if their application of the plan was an abuse of their discretion -- "which is to say, that they were not just clearly incorrect but downright unreasonable." Fuller v. CBT Corp., 905 F.2d 1055, 1058 (7th Cir. 1990).

But the application by the Trustees of the plan was not only reasonable, it was clearly a correct literal application of the plan. Based upon the undisputed evidence in the record, defendants have never wavered from the uniform literal application of the plan which requires the filing of the specified beneficiary designation card as the only way to name a death benefit beneficiary. Furthermore, in light of the evidentiary issues which naturally surround the determination of a decedent's intent, it is wise policy to insist upon compliance with the beneficiary form requirement. To do otherwise would be to invite complicated evidentiary disputes over the decedent's intent. The plan requires that a beneficiary be designated only on the form approved by the Board of Trustees. That form was not provided in this case and accordingly the Trustees' determination to split the benefits between the decedent's children was compelled by the plan.

Plaintiff also asserts that he is entitled to relief based upon a failure of the defendants to comply with the requirements of 29 U.S.C. 1133(2) which commands that the Trustees "afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision

denying the claim." Specifically, plaintiff contends that he received inadequate notice of the appellate procedure and lacked sufficient information to adequately respond to the denial. Plaintiff's argument lacks both factual and legal merit. There is no question he was notified of his opportunity to appeal the decision in writing and that he did so. Furthermore, the facts in the record indicate that the information and argument which were presented to and considered by the Trustees are all that plaintiff has to present. In fact, plaintiff has not presented any additional facts to this Court in his effort to demonstrate that the decision of the defendants was arbitrary and capricious.

Assuming some procedural irregularity it is clear that such irregularity would have been a mere technical violation which did not affect the outcome of the determination and would not entitle the plaintiff to any substantive remedy. Kreutzer v. A.O. Smith Corp., 951 F.2d 739, 743 (7th Cir. 1991). In this case plaintiff had the opportunity to submit his position in writing, and that position was considered by the Trustees. No additional procedures were required and any additional procedures would clearly not have altered the outcome. Accordingly, there is no basis for a claim based on procedural irregularity.

Estoppel by Misrepresentation.

Having determined that plaintiff is not entitled to benefits under the terms of the plan as properly and literally applied by the defendants, the Court now turns to the question of whether the actions of defendants' employee Lee are a basis to estop defendants from denying benefits. The law is clear that ERISA preempts state law including state claims based upon misrepresentation and estoppel. Thomason v. Aetna Life Ins. Co., 9 F. 3d 645, 647 (7th Cir. 1993). However, federal

common law incorporating some of the state law principles, including a limited application of the doctrine of estoppel, have been recognized. Id. Nevertheless, federal ERISA common law does not always provide a substitute federal remedy for the preempted state law claims. Id.

In order to successfully assert an estoppel claim under federal common law two conditions must be met in addition to the customary elements of common law estoppel. First, the misrepresentation must be in writing. Id at 650. Second, the application of the estoppel doctrine must not negatively affect the plan's actuarial soundness. Black v. TIC Investment Corp., 900 F. 2d 112, 115 (7th Cir. 1990). Assuming that the requirements for estoppel were otherwise met in this case, it is clear that the two additional requirements of federal common law governing estoppel in an ERISA context have not been met.

The basis for plaintiff's claim is clearly an oral representation made by defendants' agent Lee. Accepting plaintiff's allegations as true for purposes of this motion Lee orally advised plaintiff that if his father filled out the form which she sent, the plaintiff would become the sole death beneficiary. This alleged misrepresentation was never provided in writing. The fact that a written form was sent in the mail does not render the misrepresentation written because there is no allegation that any misrepresentation is contained in the writing itself. There is no question that ERISA precludes such an attempted oral modification of an ERISA pension plan. Pohl v. National Benefits Consultants, Inc., 956 F. 2d 126, 128 (7th Cir. 1992).

It has been noted that an oral misrepresentation might escape the prohibition against oral modifications of the plan if the misrepresentation could be deemed a mere interpretation of the plan. Thomason, 9 F.3d 650 n. 9. Nevertheless, assuming

that exception is applicable in the Seventh Circuit, the alleged oral misrepresentation in this case could not be deemed an interpretation of the plan. The plan is unequivocal and clear that a beneficiary designation must be made on the form approved by the Trustees. The deceased's designation of beneficiary was not made on that form. Accordingly, the attempt to legitimize a non-approved form is clearly a modification, not an interpretation of the plan.

The facts of this case also fail to meet the second requirement for the application of estoppel in the ERISA context. Estoppel is generally denied based upon misrepresentations of the scope of ERISA benefits because of a concern for the financial integrity of the ERISA plan. In Black v. TIC Investment Corp., 900 F. 2d 112, 115 (7th Cir. 1990) a limited exception was recognized:

> (W)here there is no danger that others associated with the Plan can be hurt, there is no good reason to breach the general rule that misrepresentations can give rise to an estoppel. There is no reason for the employee who reasonably relied to his detriment on his employer's false representations to suffer. There is no reason for the employer who misled its employee to be allowed to profit from the misrepresentation. We hold, therefore, that estoppel principles are applicable to claims for benefits under unfunded single-employer welfare benefit plans under ERISA. We express no opinion as to the application of estoppel principles in other situations.

Id at 115. This case involves not a single-employer unfunded plan but a multiple-employer multiple-employee pension plan.

Plaintiff's claim clearly implicates the financial soundness of the plan by raising the possibility of multiple claims for the same death benefit. Defendants' have paid benefits to plaintiff's sister. If plaintiff's claim proceeds the plan would be potentially liable for double payment of the death benefit. Given the multi-employer nature of the plan and the obvious impact of double benefit payments on the financial integrity of the plan it is clear that the exception set forth in Black is not applicable to the present plan.

Breach of Fiduciary Duty.

Plaintiff's final claim alleges that defendants are liable for breaching their fiduciary duty as a result of the misinformation supplied by their agent and employee Lee. Lee is not herself a fiduciary, since her employment duties are confined to clerical, mechanical and ministerial acts identified in 29 C.F.R. § 2509.75-8, D-2. Plaintiff advances no real argument that Lee is a fiduciary and has not named her personally as a defendant. Plaintiff's claim is dependant upon his ability to attribute Lee's negligent acts to the defendants.

Defendants rely on Pohl, 956 F. 2d 126, for the proposition that a non-fiduciary administrator cannot be held liable under ERISA's fiduciary provisions. The plaintiff correctly argues that Pohl is not directly on point. Pohl held that the administrator, not the employee who made the misrepresentation, was not a fiduciary. Id at 129. In contrast, the Trustees in this case are administrators and are also fiduciaries so that the analysis of Pohl is not directly applicable.

The question here is slightly different -- whether a fiduciary is liable for breach of fiduciary duty when a non-fiduciary agent negligently performs ministerial acts.

Fiduciaries may not be held liable so long as they have not personally contributed to the misrepresentations. The defendant fiduciaries in this case have themselves done nothing to breach their fiduciary duties to the plaintiff. The mere delegation of ministerial responsibilities to employees who negligently carry out those responsibilities is not sufficient to result in Trustee liability for breach of fiduciary duty.

Federal regulations expressly authorize that in discharging fiduciary responsibilities, a fiduciary may rely on others to perform ministerial functions including the applications of eligibility rules, advising participants of their rights and processing claims provided "he has exercised prudence in the selection and retention of such persons" 29 C.F.R. § 2509.75-8, FR-11. There is no evidence that defendant Trustees were imprudent in hiring or retaining Lee. The clear implication of that regulation is that when a fiduciary so reasonably relies upon non-fiduciaries for the performance of ministerial acts, it has met its fiduciary obligation even though a non-fiduciary might negligently perform. Otherwise, the provision would be meaningless since a fiduciary was obviously free to delegate duties while assuming full fiduciary responsibility for any negligent acts an agent might perform.

This result is also consistent with the general rule that a person is a fiduciary only to the extent that he performs discretionary functions. Klosterman v. Western General Management, Inc., 32 F.3d 1119, 1122 (7th Cir. 1994). While hiring employees is discretionary, the performance of ministerial acts is not. Accordingly, a trustee may breach a fiduciary duty by failing to exercise care in hiring, but is not liable for failure of a designee to perform ministerial acts properly.

Fischer v. Philadelphia Elec. Co., 994 F. 2d 130, 135 (3rd Cir. 1993) relied upon by the plaintiff affirms that interpretation. In Fischer benefit counselors employed by a fiduciary failed to disclose information concerning a pending plan change. The fiduciary argued that it had not breached it's duty because the benefit counselors had not been informed of the pending change and therefore truthfully advised and did not misinform the participants. The Court rejected the argument:

> This explanation will not do, for the fiduciary obligations owed to the plan participants were owed by PECo as plan administrator. These obligations cannot be circumvented by building a "Chinese wall" around those employees on whom plan participants reasonably rely for important information and guidance about retirement.

Id at 135. The breach of the fiduciary duty in Fischer came as a result of the intentional withholding by the fiduciary of relevant information which the non-fiduciary agents required in order to communicate honestly with participants. There was a specific intentional act by the fiduciary in the breach of duties which gave rise to liability. The court declines to follow the subsequent dicta of the third circuit in Taylor v. Peoples Natural Gas Co., 49 F.3d 982, 988 (1995), which purports to extend fiduciary liability further.

There is no allegation here that the defendant Trustees did anything other than prudently hire Lee to act as their ministerial agent. That act alone, prudently performed, cannot give rise to a claim for breach of fiduciary duty even though the non-fiduciary may negligently misinform participants of their rights.

Even if Lee's actions could support a breach of fiduciary claim against the trustees, it is clear that plaintiff could not obtain the remedies he seeks. A breach of fiduciary duty claim may be asserted under 29 U.S.C. § § 1132(a)(2) or (3). A claim under § 1132(a)(2) can only be brought to recover on behalf of the plan, a remedy which plaintiff is clearly not seeking here. Anweiler v. American Elec. Power Service Corp., 3 F.2d 986, 992-93 (7th Cir. 1993). Accordingly, plaintiff's only claim for breach of fiduciary duty from which he may personally benefit must be a claim based upon § 1132(a)(3) which allows a beneficiary to bring a civil action "to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan or ... to obtain the appropriate equitable relief ... to redress such violations."

The United States Supreme Court recently engaged in extensive review of what "equitable relief" constitutes with the meaning of § 1132(a)(3).

> Petitioners maintain that the objective of their suit is "appropriate equitable relief" under Section 502(a)(3). They do not, however, seek a remedy traditionally viewed as "equitable" such as injunction or restitution. ... although they often dance around the word, what petitioners in fact seek is nothing more than compensatory damages - monetary relief for all losses their plan sustained as a result of the alleged breach of fiduciary duties. Money damages are, of course, the classic form of legal relief.

Mertens v. Hewitt Associates, 508 U.S. 248, 255 (1993). Mertens expressly rejected the contention that equitable relief should be broadly construed to include any relief a common law

court of equity could provide since this would impose no limitation at all upon the relief available. Id at 257. The relief which plaintiff seeks in this case, an order requiring the defendants to pay benefits and pre-judgment interest, is precisely that relief which the Supreme Court determined was not available under § 1132(a)(3). In fact, if such relief were available under that provision the entire doctrine limiting the application of estoppel would be readily circumvented.

Accordingly, plaintiff has not as a matter of law stated a claim against the fiduciary defendants under § 1132(a)(3) based simply on the negligence of their nonfiduciary agent. Furthermore, the relief which plaintiff seeks is unavailable in an action pursuant to § 1132(a)(3).

Attorneys Fees

Defendants also seek fees pursuant to 29 U.S.C. § 1132(g)(1) which permits the Court in its discretion to allow reasonable attorneys fees to a prevailing party. Fees should not be awarded where plaintiff's claims were substantially justified. Pritchard v. Rainfair, 945 F. 2d 185, 191 (7th Cir. 1991). The Court finds this case to be inappropriate for the award of fees. Both the estoppel and breach of fiduciary duty claims were dismissed based upon the developing ERISA law. Under these circumstances it would be inappropriate to award fees. Because plaintiff's position had substantial justification an award of fees would not be appropriate.

ORDER

IT IS ORDERED that defendants' motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that defendants' motion for attorneys fees is DENIED.

IT IS FURTHER ORDERED that judgment be entered dismissing plaintiff's complaint and all claims contained therein with prejudice and costs.

Entered this 7th day of August, 1996.

BY THE COURT:

/s/
JOHN C. SHABAZ
District Judge

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

November 12, 1997

Before

Honorable WILLIAM J. BAUER, Circuit Judge

Honorable HARLINGTON WOOD, JR., Circuit Judge

Honorable ILANA DIAMOND ROVNER, Circuit Judge

No. 96-3144 & 96-3254

RICHARD A. SCHMIDT	] Appeal from the United
	] States District Court for
Plaintiff-Appellant/Cross	] the Western District of
Appellee,	] Wisconsin
	]
v.	] No. 96 C 141
	]
SHEET METAL WORKERS']	
NATIONAL PENSION	]
FUND and SHEET METAL	]
WORKERS' NATIONAL	]
PENSION FUND BOARD	]
OF TRUSTEES,	]
	]
Defendants-Appellees/	] John C. Shabaz,
Cross-Appellants.	] Chief Judge.

ORDER

On consideration of the petition for rehearing filed by plaintiff-appellant/cross appellee on October 31, 1997, all of the judges on the panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

(2)

Supreme Court, U.S.
FILED
MAR 9 1998
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No. 97-1291

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

RICHARD A. SCHMIDT,
Petitioner,
v.
SHEET METAL WORKERS' NATIONAL PENSION FUND,
and
SHEET METAL WORKERS' NATIONAL PENSION FUND
BOARD OF TRUSTEES,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF IN OPPOSITION

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14 pp

QUESTION PRESENTED FOR REVIEW

A non-fiduciary employee of the Sheet Metal Workers' National Pension Fund, in response to a participant's telephone request for information, allegedly sent the participant the wrong form. Perhaps as a result of this error, the participant did not properly designate his son as the primary beneficiary of his death benefit under the plan, and, therefore, under the terms of the plan the son and daughter each received 50% of the benefit upon the participant's death. The Fund's Board of Trustees, each member a fiduciary of the Fund, did not contribute to the employee's error; indeed, the Board of Trustees prudently hired, trained and maintained the non-fiduciary employee.

The question presented is as follows:

> Whether the non-fiduciary's alleged oral misrepresentation of a written plan provision creates a cause of action under ERISA against the Board of Trustees for a breach of fiduciary duty.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iv
STATUTES AND REGULATIONS INVOLVED	1
STATEMENT OF THE CASE	3
Facts	3
REASONS FOR DENYING THE WRIT	4
A. THE SEVENTH AND D.C. CIRCUITS ARE NOT IN CONFLICT BECAUSE THE *SCHMIDT* AND *EDDY* CASES ARE MATERIALLY DIFFERENT IN THEIR FACTS, ISSUES AND HOLDINGS	4
B. PETITIONER'S ARGUMENT THAT PLAN FIDUCIARIES ARE BOUND BY A NON-FIDUCIARY EMPLOYEE'S ORAL MISREPRESENTATION IS CONTRARY TO ERISA, AND IF ACCEPTED, WOULD JEOPARDIZE THE SOLVENCY OF PENSION PLANS LIKE THE FUND	7
CONCLUSION	10

TABLE OF AUTHORITIES

Cases: Page

Carlo v. Reed Rolled Thread Die Company, 49 F.3d 790 (1st Cir. 1995) 8

Curtis-Wright Corp. v. Schoonejongen, 514 U.S. ——, 131 L.Ed.2d 94 (1995) 9

Eddy v. Colonial Life Insurance Company of America, 919 F.2d 747 (D.C. Cir. 1990) 5, 6, 7

Franklin v. QHG of Gadsen, Inc., 127 F.3d 1024 (11th Cir. 1997) 9

Librizzi v. Children's Memorial Medical Center, Case No. 97-1934, 1998 U.S. App. LEXIS 1039 (7th Cir. 1/26/98) 8

Moore v. Metropolitan Life Insurance Company, 856 F.2d 488 (2nd Cir. 1998) 8

Nachwalter v. Christie, 805 F.2d 956 (11th Cir. 1996) 8, 9

Plumb v. Fluid Pump Service, Inc., 124 F.3d 849 (7th Cir. 1997) 8

Pohl v. National Benefit Consultants, 956 F.2d 126 (7th Cir. 1992) 8

Sprague v. General Motors Corporation, Nos. 94-1896/94-1897/94-1898/94-1937, 1998 U.S. App. LEXIS 84, *37 (6th Cir. 1998) 8

United Paperworkers v. Jefferson Smurfit, 961 F.2d 1384 (8th Cir. 1992) 8

Weir v. Federal Asset Disposition Ass'n, 123 F.3d 281 (5th Cir. 1997) 8

White v. Provident Life & Accident Insurance Company, 114 F.3d 26 (4th Cir. 1997) 8

Statutes:

§ 402, 29 U.S.C. § 1102(a)(1) 1

§ 402, 29 U.S.C. § 1106(b)(1) 7

Other Authority:

29 C.F.R. § 2509.75-8, Item D-2 ..... 2, 10

29 C.F.R. § 2520.104b-1(b)(1) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1291

RICHARD A. SCHMIDT,

Petitioner,

v.

SHEET METAL WORKERS' NATIONAL PENSION FUND,

and

SHEET METAL WORKERS' NATIONAL PENSION FUND BOARD OF TRUSTEES,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF IN OPPOSITION

STATUTES AND REGULATIONS INVOLVED

Employee Retirement Income Security Act of 1974, § 402, 29 U.S.C. § 1102(a)(1):

> Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

29 C.F.R. § 2509.75-8, Item D-2:

Q: Are persons who have no power to make any decisions as to plan policy, interpretations, practices or procedures, but who perform the following administrative functions for an employee benefit plan, within a framework of policies, interpretations, rules, practices and procedures made by other persons, fiduciaries with respect to the plan:

(1) Application of rules determining eligibility for participation or benefits;

(2) Calculation of services and compensation credits for benefits;

(3) Preparation of employee communications material;

(4) Maintenance of participants' service and employment records;

(5) Preparation of reports required by government agencies;

(6) Calculation of benefits;

(7) Orientation of new participants and advising participants of their rights and options under the plan;

(8) Collection of contributions and application of contributions as provided in the plan;

(9) Preparation of reports concerning participants' benefits;

(10) Processing of claims; and

(11) Making recommendations to others for decisions with respect to plan administration?

A: No. Only persons who perform one or more of the functions described in section 3(21)(A) of the Act with respect to an employee benefit plan are

fiduciaries. Therefore, a person who performs purely ministerial functions such as the types described above for an employee benefit plan within a framework of policies, interpretations, rules, practices and procedures made by other persons is not a fiduciary because such person does not have discretionary authority or discretionary control respecting management of the plan, does not exercise any authority or control respecting management or disposition of the assets of the plan, and does not render investment advice with respect to any money or other property of the plan and has no authority or responsibility to do so.

However, although such a person may not be a plan fiduciary, he may be subject to the bonding requirements contained in section 412 of the Act if he handles funds or other property of the plan within the meaning of applicable regulations.

The Internal Revenue Service notes that such persons would not be considered plan fiduciaries within the meaning of section 4975(e)(3) of the Internal Revenue Code of 1954.

STATEMENT OF THE CASE

Facts [1]

The Sheet Metal Workers' National Pension Fund (hereinafter *Fund*) provides a pension plan summarized in a booklet provided to participants and beneficiaries ("Booklet") (Sweger Aff., ¶ 6, Record 24).[2] The Fund

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[1] Respondents also incorporate by reference the statement of facts in the decision below. Petitioner's Appendix (hereinafter *Pet. App.*) at 1-13.

[2] The Fund sent Booklets to all Sheet Metal Workers Local Union 18 members in mid-1990, using the International Union's mailing list. Schmidt and his father were Local 18 members. The Fund mailed the Booklets according to its usual and customary method of sending the Booklets by First Class U.S. Mail, with prepaid

is governed by a Board of Trustees (hereinafter *Trustees*) (Sweger Aff., ¶ 4, Record 24). The Fund employs benefit analysts to perform various non-discretionary tasks. The benefit analysts have no fiduciary responsibilities. *Id.*

This case involves eligibility for death benefits under the pension plan. The pension plan, as described in the Booklet, permits a participant to designate a death benefit beneficiary by completing a card, contained in the Booklet, and filing the card with the participant's local union. *Id.* If no beneficiary is so designated, the death benefit is paid to a spouse, if any, or to the participant's children in equal amounts. *Id.* The petitioner, Richard A. Schmidt, concedes that his father, the particpant, did not designate him as the beneficiary pursuant to the Booklet, Section 7.01 (Amended Compl., ¶ 18, Record 13). Nonetheless, Schmidt claims he is entitled to the entire lump-sum benefit, rather than having to split the benefit with his sister as the Fund determined. Schmidt bases his claim on his contention that Eunjae Lee, a benefit analyst, orally misrepresented the beneficiary designation requirement, thereby modifying the written plan.

REASONS FOR DENYING THE WRIT

A. THE SEVENTH AND D.C. CIRCUITS ARE NOT IN CONFLICT BECAUSE THE *SCHMIDT* AND *EDDY* CASES ARE MATERIALLY DIFFERENT IN THEIR FACTS, ISSUES AND HOLDINGS.

Schmidt asserts that the Seventh Circuit's decision below (hereinafter *Schmidt*) conflicts with the District of

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postage (Bishop Aff., ¶ 5, Record 22; Sweger Aff., ¶ 7, Record 24). Implicit in ERISA's statutory and regulatory disclosure scheme, where a pension fund uses First Class U.S. Mail for summary plan descriptions, it need not establish actual receipt by each claimant. See 29 C.F.R. § 2520.104b-1(b)(1) Disclosure (providing that mailing summary plan descriptions by second or third class mail requires return and forwarding postage, and an address correction request).

Columbia Circuit's decision in *Eddy v. Colonial Life Insurance Company of America,* 919 F.2d 747 (D.C. Cir. 1990). *Schmidt* and *Eddy* do not conflict.

In *Schmidt* the court held that an oral misrepresentation by a non-fiduciary employee of a pension plan does not, without more, constitute a breach of the Trustees' fiduciary duties to the participant; especially where the fiduciaries had, in fact, provided the participant with full and accurate information in the Booklet. In *Eddy,* by contrast, the D.C. Circuit held that the fiduciary had not provided the participant with full and accurate information, and thereby breached its fiduciary duty.

The Seventh Circuit viewed *Schmidt* as a case where "[t]he Trustees provided complete and accurate information in the Plan and Plan Booklet only to have a ministerial employee make a negligent misrepresentation in response to a single question from a single participant." (Pet. App. 10). In determining whether the Trustees had breached their fiduciary duties, the Seventh Circuit considered "[w]hether Lee's misstatement could be said to have breached the duties owed to plan participants by the Trustees themselves, as they were the only ERISA fiduciaries named as defendants in this case." (Pet. App. 9). The Seventh Circuit held "that Lee's misstatement would not in these circumstances support a breach of fiduciary duty claim against the Trustees." (Pet. App. 11).

In *Eddy, supra,* the D.C. Circuit considered the scope of an insurance company's duty to "disclose and inform". *Eddy v. Colonial Life Insurance, supra,* 919 F.2d at 751. The D.C. circuit held that the duty to "inform" requires that a fiduciary not only refrain from misinforming beneficiaries, but refrain from silence:

> Regardless of the precision of his question, once a beneficiary makes known his predicament, the fiduciary "is under a duty to communicate . . . all material

> facts in connection with the transaction which the trustee knows or should know." [citation omitted]

Id. at 751.

In its search for a circuit conflict, Schmidt misreads the *Eddy* decision. Schmidt represents that in *Eddy*, "a non-fiduciary insurance agent, not a fiduciary, failed to covey [sic] complete and correct information to Eddy." (Petition, p. 11). Schmidt's factual assertion that the agent was not a fiduciary contradicts the D.C. Circuit's express finding that "Chubb [the insurance company] concedes that it is a fiduciary within the meaning of sec. 1104 of ERISA, 29 U.S.C. § 1104." *Eddy v. Colonial Life Insurance, supra,* 919 F.2d at 750. Given that the court and the parties deemed that the participant dealt with an insurance company fiduciary, the D.C. Circuit's holding that there is a duty to convey complete and correct material information is explicitly limited to *fiduciaries*:

> We find that the standard of care articulated by the trial court was too narrow and hold that a *fiduciary* in Chubb's position has a duty upon inquiry to convey to a lay beneficiary like Eddy correct and complete material information . . . .

Id. (emphasis added).[3] By contrast, the Fund's benefit analyst is not a fiduciary; therefore, Schmidt was not dealing with a fiduciary when he dealt with the Fund.

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[3] Schmidt's baseless assertion that the agent in *Eddy* was not a fiduciary may be a misreading of the D.C. circuit's statement that "[o]nce Eddy indicated his predicament to *Chubb representatives*, Chubb bore a fiduciary duty under ERISA to convey to Eddy correct and complete material information as to his status and his coverage options." *Eddy v. Colonial Life Insurance, supra,* 919 F.2d at 752 (emphasis added). The assertion that Chubb's representatives are non-fiduciaries is baseless because the D.C. Circuit does not comprehensively describe Chubb's representatives, but for purposes of its analysis, assumes that the representatives are fiduciaries; the only logical inference from the *Eddy* decision, then, is that Chubb's representatives are fiduciaries

The Seventh and the D.C. Circuits applied the same standard: Whether the fiduciary met its obligation to properly inform the participant. Based on the particular facts of each case, the Seventh Circuit held that the fiduciary satisfied its duty, while the D.C. Circuit held that the fiduciary breached its duty. Specifically, the Seventh Circuit considered whether the Trustees acted prudently in hiring, training, and retaining the benefit analyst. The Seventh Circuit held that the Trustees satisfied their fiduciary duty notwithstanding the benefit analyst's alleged error. Since, the Seventh Circuit's decision is entirely consistent with *Eddy*, Petitioner presents no conflict in the circuits.

B. PETITIONER'S ARGUMENT THAT PLAN FIDUCIARIES ARE BOUND BY A NON-FIDUCIARY EMPLOYEE'S ORAL MISREPRESENTATION IS CONTRARY TO ERISA, AND IF ACCEPTED, WOULD JEOPARDIZE THE SOLVENCY OF PENSION PLANS LIKE THE FUND.

It is important to note what the Petition seeks. The courts below held that the Fund was not estopped from denying the full death benefit. Schmidt does not seek certiorari on his estoppel claim. Rather, Petitioner only raises the Trustees' alleged breach of fiduciary duty as a basis for certiorari. The distinction is critical. This is not now a benefits claim against the Fund to be paid from Fund assets (as would be the case if estoppel were applied). The Fund could not pay for a successful breach of fiduciary duty claim against the Trustees, but instead each Trustee would be liable. 29 U.S.C. § 1106(b)(1). Thus, the Seventh Circuit correctly examined only the Trustee's duties to Petitioner.[4]

Every court of appeals to have considered the issue supports the Seventh Circuit's rejection of Schmidt's breach

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[4] In *Eddy*, the insurance company was the fiduciary. Thus, the court there examined the insurance company's duties to the participant; and the insurance company was liable for the breach.

of fiduciary duty claim against the Trustees based on an alleged oral misrepresentation by a non-fiduciary such as Lee. In *Pohl v. National Benefit Consultants*, 956 F.2d 126 (7th Cir. 1992), the Seventh Circuit held that claims based on oral modifications are not available because ERISA confines benefits to written plans:

> One of ERISA's purposes is to protect the financial integrity of pension and welfare plans by confining benefits to the terms of the plans as written, thus ruling out oral modifications.

Id., 956 F.2d at 128. The court in *Pohl* also explained that a claim for a non-fiduciary's misrepresentation cannot be revived under another name such as "breach of fiduciary duty" as Schmidt attempts here:

> ERISA makes the existence of discretion a sine qua non of fiduciary duty. 29 U.S.C. § 1002(21)(A) . . .
>
> . . . Hence, the [plaintiffs] have no claim against [the non-fiduciary plan administrator] under the fiduciary provisions of ERISA—or under any other provisions. They have no claim . . .

Id., 956 F.2d at 129.[5]

The Seventh Circuit's holding that trustees do not breach their fiduciary duties by refusing to modify written

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[5] *Pohl* expresses the rule in all circuits that have spoken to the issue. *See* discussion in *Carlo v. Reed Rolled Thread Die Company*, 49 F.3d 790, 795 n.4 (1st Cir. 1995); *Moore v. Metropolitan Life Insurance Company*, 856 F.2d 488, 492 (2nd Cir. 1998); *White v. Provident Life & Accident Insurance Company*, 114 F.3d 26, 29 (4th Cir. 1997); *Weir v. Federal Asset Disposition Ass'n*, 123 F.3d 281, 289 (5th Cir. 1997); *Sprague v. General Motors Corporation*, Nos. 94-1896/94-1897/94-1898/94-1937, 1998 U.S. App. LEXIS, 84, *37 (6th Cir. 1998); *Librizzi v. Children's Memorial Medical Center*, Case No. 97-1934, 1998 U.S. App. LEXIS 1039, *3 (7th Cir. 1/26/98); *Plumb v. Fluid Pump Service, Inc.*, 124 F.3d 849, 856 (7th Cir. 1997); *United Paperworkers v. Jefferson Smurfit*, 961 F.2d 1384, 1386 (8th Cir. 1992); *Nachwalter v. Christie*, 805 F.2d 956, 959-60 (11th Cir. 1996) (en banc).

plan language based on a non-fiduciary employee's oral misrepresentation is also firmly rooted in ERISA's legislative purpose:

> In the words of the key congressional report, "[a] written plan is to be required in order that every employee may, *on examining the plan documents*, determine exactly what his rights and obligations are under the plan. HR Rep. No. 93-1280, p. 297 (1974) (emphasis added).

Curtis-Wright Corp. v. Schoonejongen, 514 U.S. ——, 131 L.Ed.2d 94, 103 (1995). Congressional concern underlying ERISA's requirement that participants' rights be governed by written plan documents not only ensures predictability, but protects future benefits:

> . . . [R]etirement benefits could be radically affected by funds disbursed to other employees pursuant to oral agreements.

Franklin v. QHG of Gadsen, Inc., 127 F.3d 1024, 1029 (11th Cir. 1997) (quoting *Nachwalter v. Christie*, 805 F.2d 956, 960 (11th Cir. 1986)).[6]

Thus, the Seventh Circuit's decision carries out ERISA's goal of protecting employee benefit plan participants and beneficiaries from uncertainty and radical changes to their future benefits. Moreover, The result Schmidt seeks would essentially make the Trustees the Fund's insurers for non-fiduciary employees' ministerial errors, even where the Trustees prudently performed their duty to select, train and maintain non-fiduciary employees. ERISA's fiduciary rules do not contemplate such a far reaching standard. Indeed, the regulations expressly permit fiduciaries to rely on non-fiduciaries to perform ministerial functions includ-

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[6] In the case below Petitioner was provided full and accurate information in the plan Booklet. If a non-fiduciary misrepresentation can override the Booklet, then the plan may be subject to claims beyond those contemplated by its terms. This could create funding uncertainties that could threaten plan solvency.

ing the "[p]reparation of employee communications material . . . ," the function wherein Lee allegedly made the misrepresentation. See 29 C.F.R. § 2509.75-8, Item D-2 Q(3), A.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

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March 9, 1998

(3)

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No. 97-1291

In The
Supreme Court of the United States
October Term, 1997

RICHARD A. SCHMIDT,
Petitioner,

v.

SHEET METAL WORKERS' NATIONAL PENSION FUND,
and
SHEET METAL WORKERS' NATIONAL PENSION FUND
BOARD OF TRUSTEES,
Respondents.

On Petition For Writ of Certiorari To The United States Court of Appeals for the Seventh Circuit

REPLY TO BRIEF IN OPPOSITION

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8 pp

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF CITATIONS i

RESPONDENTS PROFFERED "REASONS FOR DENYING THE WRIT" ARE MERITLESS 1

CONCLUSION 5

TABLE OF CITATIONS

Cases Cited

Eddy v. Colonial Life Insurance Company of America, 919 F.2d 747 (D.C. Cir. 1990) 1-6

Pohl v. National Benefit Consultants, 956 F.2d 126 (7th Cir. 1992) 3-4

Schmidt v. Sheet Metal Workers' National Pension Fund, 128 F.3d 541 (7th Cir. 1997) 1-6

RESPONDENTS PROFFERED "REASONS FOR DENYING THE WRIT" ARE MERITLESS

In their Brief in Opposition, Respondents first proffered reason for denying Petitioner a writ is that there is allegedly no conflict in the "facts, issues and holdings" between the Seventh Circuit's decision below, *Schmidt v. Sheet Metal Workers' National Pension Fund*, 128 F.3d 541 (7th Cir. 1997), and the District of Columbia Circuit's decision in *Eddy v. Colonial Life Insurance Company of America*, 919 F.2d 747 (D.C. Cir. 1990). This is nonsense. It would be difficult to find two cases with facts or issues closer than those in *Schmidt* and *Eddy*. Moreover, the holdings are diametrically opposed.

In *Eddy*, ERISA fiduciary Colonial Life Insurance Company's (Chubb) non-fiduciary employee failed to provide complete and correct material information to an ERISA health insurance plan participant. In *Schmidt*, Respondent ERISA fiduciary National Pension Fund's (NPF) non-fiduciary employee failed to provide complete and correct material information to an ERISA pension plan participant. In *Eddy*, the D.C. Circuit held that such failure constituted a violation of the ERISA fiduciary duty. In *Schmidt*, the Seventh Circuit held that such a failure did not constitute a violation of the ERISA fiduciary duty. This is a direct and obvious conflict.

In their effort to convince this Court that there is no conflict between the circuits, Respondents come very close to directly misrepresenting the facts and the law. In their brief, Respondents tell this Court that unlike the NPF Trustees' employee in *Schmidt* (a "benefit analyst"), Chubb's employee in *Eddy* (an insurance agent) was a "fiduciary" because the D.C. Circuit expressly held that "Chubb [the insurance company] concedes that it is a fiduciary ...". This, however, no more makes

Chubb's non-fiduciary employee a "fiduciary" than Respondent NPF Trustees' own concession that they are fiduciaries makes their non-fiduciary employee a "fiduciary."'[1]

Respondents also attempt to distinguish *Schmidt* and *Eddy*, by claiming that only in *Schmidt* did the fiduciaries provide full and accurate information (a booklet) prior to their employees provision of misinformation. This is a misrepresentation of the facts. In *Eddy*, Chubb had initially mailed Eddy a document containing correct information that contradicted their employee's subsequent provision of misinformation. *Id.*, p. 751. Again, it would be hard to find two more factually similar cases.

In reaching contradictory holdings on virtually the same factual situations, the D.C. and Seventh Circuits thus created incompatible law. In the D.C. Circuit, ERISA fiduciaries have a duty to convey complete and correct material information to plan participants and beneficiaries. Period. Since *Schmidt*, however, in the Seventh Circuit, fiduciaries are absolved from providing complete and correct material information where they use prudently hired and retained, non-fiduciary employees as their informational conduits. This obvious conflict cries out for resolution by this Court.

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[1] In a footnote, Respondents claim that "the only logical inference from the *Eddy* decision" is that the insurance agent who made the misrepresentation to Eddy was a fiduciary. (Opposition Brief, p. 6). Respondents "logic," however, is seriously flawed if it really leads to the inference that one of the insurance agents employed to answer calls from Chubb's insureds regarding their insurance coverage (virtually the same job as Respondent's "Benefits Analyst" in this case) was actually a fiduciary for the Colonial Life Insurance Company of America. It is more logical to infer that an employee in an entry-level position is not a fiduciary of the national company for which he or she works.

Respondents second proffered reason for denying petitioner's a writ is that allowing a cause of action for a failure to provide complete and correct material information would allegedly "jeopardize the solvency of pension plans" like Respondent NPF. (Opposition Brief, p. 7). This "reason," however, goes directly to the merits of whether a cause of action for breach of fiduciary duty, as set forth in *Eddy, supra*, should exist, or whether the Seventh Circuit's conflicting decision in *Schmidt, supra*, is the correct one. This is exactly the issue that this Court should resolve by granting a writ of certiorari.

Briefly, however, Respondents' arguments on the merits in favor of the holding in *Schmidt*, as opposed to *Eddy*, are conclusively wrong. First, Respondents immediately undercut their own argument about "jeopardizing the solvency of pension plans" by noting that under the cause of action for breach of fiduciary duty, the fiduciaries, not the pension fund, would be liable. On its face, then, Respondents' argument that such cause of action would "jeopardize the solvency" of ERISA pension funds is clearly illogical.

In further arguing the merits of the Seventh Circuit's decision in *Schmidt*, Respondents move from the foregoing lapse in logic to a misstatement of law. They argue that "[e]very court of appeals to have considered the issue supports the Seventh Circuit's rejection of Schmidt's breach of fiduciary claim against the Trustees based on an alleged oral misrepresentation by a non-fiduciary ...". (Opposition Brief, p. 8). In support of this broad statement of the law, Respondents then discuss a single case: *Pohl v. National Benefit Consultants*, 956 F.2d 126 (7th Cir. 1992). *Pohl*, however, does not support Respondents

contention at all.[2]

In *Pohl*, an employee of an insurance company that served as an ERISA health plan administrator, misrepresented plan coverage to a participant. The participant sued under state law for negligent misrepresentation. The health insurance company removed to federal court and the Seventh Circuit stated that ERISA superseded state law and there was no cause of action for negligent misrepresentation under ERISA. *Id.*, p. 128. Significantly, the Seventh Circuit then stated:

> But is there truly no remedy? ... for breach of fiduciary duty ERISA does provide remedies ...

Id. The Seventh Circuit then precluded a breach of fiduciary claim in that case because the insurance company was not an ERISA fiduciary, not because the insurance company's employee, who made the actual misrepresentation, was not an ERISA fiduciary. *Id.* In this case, however, Respondent NPF Trustees are indisputably ERISA fiduciaries. Thus *Pohl* directly supports Schmidt's right to sue Respondent NPF Trustees for breach of fiduciary duty for their failure to disclose complete and correct material information. This indicates that *Schmidt* not only conflicts with *Eddy*, but that *Schmidt* was wrongly decided as a matter of law.

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[2] Nor do Respondents' string citations in footnote 5 of their Opposition Brief. In each of the cases cited by Respondents, where the court sought to determine whether a claim for breach of fiduciary duty would lie, it looked to the nature of the *entity* which made the alleged misrepresentation, *not* whether the *individual person* who said or wrote down the words constituting the actual misrepresentation was a fiduciary. *Eddy* follows this clear trend in the law. *Schmidt* constitutes a radical departure.

Respondents also argue that disallowing a cause of action for their failure to provide complete and correct material information protects "benefit plan participants and beneficiaries from uncertainty and radical changes to their future benefits." (Opposition Brief, p. 9). This argument is a red-herring. If Petitioner prevails in this case, the NPF plan will not change one iota. The only change will be that Respondents will have an incentive to more carefully carry out their fiduciary duty to provide complete and correct material information to plan participants. This was clearly the reasoning behind the holding in *Eddy*.

Finally, Respondents argue that the result Schmidt seeks -- i.e. an application of the holding in *Eddy* -- would make them "insurers for non-fiduciary employees' ministerial errors." (Opposition Brief, p. 9). Respondents, however, misunderstand the difference between a "ministerial employee," and a "ministerial error." In this case, Respondents used a ministerial employee as conduit to convey material information to participants. The fact that their employee -- Respondents' chosen mouthpiece for the provision of information -- rather than an actual fiduciary failed to provide Petitioner with complete and correct material information, however, does not somehow change what would have been a breach of fiduciary duty if done by a fiduciary, into a "ministerial error" when done by the fiduciary's employee. To hold otherwise, is to create a huge loop-hole by which ERISA fiduciaries can avoid their duty to provide complete and correct material information. This is the loop-hole that the D.C. Circuit closed in *Eddy*, and the Seventh Circuit reopened in *Schmidt*.

CONCLUSION

Schmidt and *Eddy* are in direct conflict on an issue that is of the utmost importance to millions of pension plan participants and beneficiaries. Petitioner Richard Schmidt respectfully requests that this Court grant his Petition for Writ of Certiorari in order to resolve this conflict.

Respectfully submitted,

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